SC86948

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI EX REL.

GENERAL MOTORS ACCEPTANCE CORPORATION,

Relator,

vs.

THE HONORABLE RICHARD E. STANDRIDGE,

Respondent.

On Petition for Writ of Prohibition from the
Circuit Court of Jackson County, Missouri,
Associate Circuit Judge Division
The Honorable Richard E. Standridge

BRIEF OF RELATOR GENERAL MOTORS ACCEPTANCE CORPORATION

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JURISDICTIONAL STATEMENT

This is an original action in prohibition against Respondent, Judge Richard E. Standridge of the Associate Circuit Judge Division of the Circuit Court of Jackson County, Missouri, seeking to prohibit Respondent from enforcing discovery and refusing to issue a protective order in a malicious prosecution action brought against relator General Motors Acceptance Corporation ("GMAC") by counterclaim plaintiff Michael Marcum. Pursuant to Article V, Section 4 of the Constitution of the State of Missouri of 1945, as amended, the Supreme Court has superintending jurisdiction over all inferior courts, including the jurisdiction to issue and determine original remedial writs. The Missouri Court of Appeals, Western District, has previously declined to issue a writ of prohibition against Respondent with respect to the issues raised herein, so only this Court has the power to grant adequate relief. *See* Mo. Sup. Ct. R. 84.22(a).

STATEMENT OF FACTS[1]

A. Collection Action and Counterclaim

On August 18, 2000, Marcum purchased, for $16,500, a used Ford automobile from Ray Shepherd Motors, a Kansas car dealership, and entered into a retail-installment contract that was assigned to GMAC. Upon sale of a vehicle, a

[1] GMAC's Petition for Writ of Prohibition will be cited as "Petition ¶ ___," and the Appendix of Exhibits will be cited "Appendix ___." Items in the appendix to this brief will be cited as "(A-___)."

dealership is responsible for causing the State to deliver title in a timely fashion. In this instance, Ray Shepherd Motors failed to get the State to deliver title by the time of vehicle delivery to Marcum. Petition ¶¶ 3-5; Appendix 1, 5-6.

After Marcum failed to remit timely payments on the contract for several months, GMAC repossessed the vehicle in January 2001 and sold it at auction for $12,300. In April, 2004, GMAC commenced the underlying action ("the collection action") for the deficiency plus costs related to the repossession ($5,240.25 in damages). Appendix 1-7. On June 18, 2004 and as part of his answer, Marcum filed a counterclaim for malicious prosecution (the "counterclaim") against GMAC. Appendix 8-11. Marcum alleges that "Ray Shepherd Motors, Inc., failed to assign the title to the subject vehicle to [Marcum] within the time required by law and therefore the sale was fraudulent and void." *Id.* at 9. He alleges that, accordingly, GMAC "instituted this lawsuit" (the collection action) "maliciously and without probable cause." *Id.* at 10. After Marcum filed a motion for summary judgment based upon his alleged untimely receipt of title, GMAC dismissed the collection action with prejudice. Appendix 43; Petition ¶¶ 6-11.

B. The Missouri and Kansas Title Discovery

The discovery requests that give rise to this Petition for Writ of Prohibition are Marcum's Interrogatory Nos. 9 and 10 and Document Request Nos. 2 and 4. Appendix 24-25, 29-30. Generally stated, the first three of these requests require GMAC to produce information and corresponding documents related to *"any* and

all buyers with Missouri and Kansas addresses" "regarding whose transactions GMAC has *any* knowledge that the buyer did not receive a title to his or her vehicle within 30 days" of delivery (collectively "the Missouri and Kansas title discovery"). Appendix 24 (emphasis added). Interrogatory No. 9 is unlimited in time; Interrogatory No. 10 requests information that is essentially a subset of the information called for in No. 9. Document Request No. 4 (Appendix 30) seeks communications with state agencies regarding the buyers identified in Interrogatory Nos. 9 and 10. None of the discovery requests is limited to persons against whom GMAC brought suit. Petition ¶¶ 12-16.

C. Respondent's Discovery Orders

From the outset, GMAC objected that the Missouri and Kansas title discovery was (1) unlimited in time, scope and nature, (2) overly broad, and (3) not limited to the events arising out of Marcum's pleading and the underlying installment contract (*i.e.* irrelevant). Appendix 24-25, 32. On December 1, 2004, Marcum filed a Motion to Enforce Discovery challenging GMAC's objections and responses and seeking an order requiring GMAC to respond to the Missouri and Kansas title discovery. Appendix 15-42. GMAC filed a timely response (Respondent's Appendix 1-7) and, on March 29, 2005, Respondent heard arguments on the Motion to Enforce. At the unrecorded hearing, Respondent told counsel he would relieve GMAC of any responsibility to respond to Interrogatory No. 8, would impose a 10-year time period for Interrogatory No. 9, and would consider arguments to reduce the scope of discovery and/or shift costs at a May 3,

2005 hearing. Petition ¶¶ 17-20. Respondent's docket sheet simply shows the matter was continued. Appendix 63 (A-2).

Pursuant to Respondent's willingness to consider arguments on cost-shifting and restricting the scope of discovery, GMAC on April 25, 2005 filed a Motion for Protective Order with supporting affidavits to prevent enforcement of the Missouri and Kansas title discovery because (1) it involves irrelevant information, and (2) the burden of retrieving this information substantially outweighs any conceivable benefit to Marcum. Appendix 64-88. GMAC also argued, in the alternative, that the cost of responding to the Missouri and Kansas title discovery should be shifted to Marcum. *Id*. On April 28, 2005, Marcum moved to strike GMAC's Motion for Protective Order as being noncompliant with local rule 33.5.4 but did not otherwise respond to the Motion for Protective Order.[2] Appendix 89-91; Petition ¶¶ 21-23.

[2] Marcum asserted that GMAC's motion violated local rule 33.5.4 because GMAC's counsel did not first consult with Marcum in writing. However, the rule is inapplicable because Respondent expressly authorized GMAC to file the motion in the context of an ongoing discovery dispute. Moreover, GMAC's counsel communicated with Marcum's counsel—orally and in writing—after the May 3, 2005 hearing. Petition ¶ 25. Respondent ultimately denied a protective order on the merits without taking up Marcum's motion to strike.

Respondent did not take up either motion at the May 3 hearing, instead directing the parties to attempt to resolve the discovery dispute and return to court on June 7, 2005; again, Respondent's docket sheet shows the matter was continued. Appendix 63 (A-2). Between May 3 and June 7, the parties engaged in oral and written communication, but were unable to resolve the impasse. Petition ¶ 25. Then, after a brief hearing on June 7, 2005, Respondent denied GMAC's Motion for Protective Order in a cursory docket entry. Appendix 63 (A-2); Petition ¶¶ 26-27.

D. Proceedings Before The Court of Appeals

On June 14, 2005, GMAC sought a writ of prohibition from the Missouri Court of Appeals for the Western District. Petition ¶ 32. On June 21, 2005, that court questioned the trial court's jurisdiction over the case and ordered the parties to "show cause why the trial court should not be directed to dismiss the underlying case without prejudice due to lack of jurisdiction." Appendix 106. After briefing from the parties (Appendix 107-28), the Western District on July 6, 2005 entered an order denying the writ and finding that the jurisdictional issue was "not clear cut" and could be considered later and that "it is not clear that the trial court's discovery rulings exceed [the trial court's] jurisdiction." Appendix 130.

E. Information Retrieval Procedures and Costs

Two affidavits filed with GMAC's Motion for Protective Order explain the actions and costs required to extract the requested discovery from GMAC's records. Appendix 74-88; Petition ¶¶ 38-47. GMAC has no central repository

related to title delivery—in the legal department or otherwise—that could be quickly reviewed and segregated according to Missouri and Kansas addresses. Consequently, GMAC must search for responsive information on a customer-by-customer basis. There is no way to do a global word search across a number of customer accounts. Accordingly, this process would involve a line-by-line dissection of so-called "customer comments screens" ("CC screens") for abbreviated references related to concepts such as title, complaint, and delivery for approximately 540,000 Missouri and Kansas customers since January 1, 1995. *See* Appendix 79, 82-88 (example of a customer comment screen). The active system includes CC screens for accounts not yet paid in full, those paid in full in the preceding 36 months, and loss accounts less than seven years old. Because some older CC screens are not in the active system, these would need to be restored from backup tapes and archives, at a cost of between $50,000 and $70,000. Petition ¶¶ 38-42.

To staff this project, GMAC would need to train and hire temporary workers, at a rate of $13.90 per hour. On average, it would take them 7 minutes to review each CC screen, which equates to 8.5 customers per hour. Based upon these numbers, the review cost for 540,000 customers would be approximately $883,058.81. When combined with reasonable training costs and the costs of restoring and reviewing additional information for loss accounts, the cost of this project approaches $1,000,000. Petition ¶¶ 43-47.

POINTS RELIED ON

I. Relator Is Entitled To An Order Prohibiting Respondent From Enforcing Marcum's Discovery And Denying A Motion For Protective Order For Any Discovery (1) Regarding GMAC's Knowledge Of Title Delivery To Purchasers Against Whom GMAC Never Filed Suit And (2) Involving Delivery Of Title By Any Dealership Other Than The One Where Marcum Purchased His Vehicle Because Respondent Abused His Discretion By Ordering And Failing To Prohibit—Without Any Explanation—Irrelevant, Overbroad and Unduly Burdensome Discovery In That It Does Not Relate To Matters Put At Issue In The Pleadings And Requires GMAC To Incur Burdensome Costs Approaching $1,000,000 That Are Entirely Unreasonable and Disproportionate To A Malicious Prosecution Action Arising Out Of A Collection Action On A Single Repossessed Automobile.

State ex rel. Ford Motor Co. v. Nixon, 160 S.W.3d 379 (Mo. banc 2005)

State ex rel. Ford Motor Co. v. Messina, 71 S.W.3d 602 (Mo. banc 2002)

State ex rel. Madlock v. O'Malley, 8 S.W.3d 890 (Mo. banc 1999)

State ex rel. Anheuser v. Nolan, 692 S.W.2d 325 (Mo. App. 1985)

II. In The Alternative To Point I, Relator Is Entitled To An Order Prohibiting Respondent From Denying Relator's Motion That Relator's Discovery Response Costs Be Shifted To Marcum Because Respondent Abused His Discretion By Denying Any Cost Shifting,

Without Any Explanation, In That The Requested Information Has Little Or No Value And Is Available Only At A High Cost Entirely Disproportionate To This Case.

Stortz by Stortz v. Seier, 835 S.W.2d 540 (Mo. App. 1992)

Rowe Entertainment, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002)

Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309 (S.D.N.Y. 2003)

Mo. Sup. Ct. R. 56.01(c)

III. In The Alternative To Points I and II, Relator Is Entitled To An Order Prohibiting Respondent From Continuing To Exercise Jurisdiction Over The Underlying Case And Directing Respondent To Dismiss It Without Prejudice Due To Lack Of Jurisdiction Because Marcum Filed His Counterclaim For Malicious Prosecution Before It Had Accrued In That The Alleged Malicious Action Filed By GMAC Was Still Pending When Marcum Asserted His Claim.

Farmers Insurance Co. v. Miller, 926 S.W.2d 104 (Mo. App. 1996)

Niedringhaus v. Zucker, 208 S.W.2d 211 (Mo. 1948)

Euge v. LeMay Bank & Trust Co., 386 S.W.2d 398 (Mo. 1965)

Lindsay v. Evans, 174 S.W.2d 390 (Mo. App. 1943)

ARGUMENT

Standard of Review

"Prohibition is the proper remedy for an abuse of discretion during discovery." *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. banc 2002). "The trial court abuses discretion if its order is clearly against the logic of the circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration." *Id*. The petitioner has the burden to prove abuse of discretion (*id*.), but the "'party seeking discovery shall bear the burden of establishing relevance.'" *State ex rel. MacDonald v. Franklin*, 149 S.W.3d 595, 597 (Mo. App. 2004) (quoting Mo. Sup. Ct. R. 56.01(b)(1)(A-3)).

Prohibition is also the appropriate remedy when a trial court acts without jurisdiction. *See State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994). Trial court action taken without subject matter jurisdiction is void. *Strozewski v. Springfield*, 875 S.W.2d 905, 907 (Mo. banc 1994).

I. Relator Is Entitled To An Order Prohibiting Respondent From Enforcing Marcum's Discovery And Denying A Motion For Protective Order For Any Discovery (1) Regarding GMAC's Knowledge Of Title Delivery To Purchasers Against Whom GMAC Never Filed Suit And (2) Involving Delivery Of Title By Any Dealership Other Than The One Where Marcum Purchased His Vehicle Because Respondent Abused His Discretion By Ordering And Failing To Prohibit—Without Any Explanation—Irrelevant, Overbroad and Unduly Burdensome

Discovery In That It Does Not Relate To Matters Put At Issue In The Pleadings And Requires GMAC To Incur Burdensome Costs Approaching $1,000,000 That Are Entirely Unreasonable and Disproportionate To A Malicious Prosecution Action Arising Out Of A Collection Action On A Single Repossessed Automobile.

A. Legal Standards

In recent years, this Court has repeatedly issued writs of prohibition against excessive and abusive discovery. *See, e.g., State ex rel. Ford Motor Co. v. Nixon*, 160 S.W.3d 379 (Mo. banc 2005); *State ex rel. Ford Motor Co. v. Messina,* 71 S.W.3d 602 (Mo. banc 2002); *State ex rel. Madlock v. O'Malley*, 8 S.W.3d 890 (Mo. banc 1999). The Court has rejected the notion that the discovery process is a "scorched earth battlefield" (*id.* at 891) and repeatedly explained that a trial court faced with objections to discovery must consider and balance a number of factors. "A protective order should issue if annoyance, oppression, and undue burden and expense outweigh the need for discovery." *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d at 607. *Accord State ex rel. Anheuser v. Nolan,* 692 S.W.2d 325, 328 (Mo. App. 1985) (court's determination of appropriate boundaries of discovery involves pragmatic weighing of the conflicting interests of interrogator and respondent).

At the most basic level, a court must evaluate the relevance and potential value of the requested discovery in light of the pleadings. *State ex rel. Jones v. Syler*, 936 S.W.2d 805, 807 (Mo. banc 1997) ("As with other discovery, the

narrowness or breadth of the medical authorization required is directly controlled by the narrowness or breadth of the allegations in plaintiff's petition."). Discovery that exceeds the boundaries of the petition is off limits and must be prohibited. *Id.*; *State ex rel. Ford Motor Co. v. Nixon,* 160 S.W.3d at 381 (trial court must "limit discovery to the reasonable parameters of the petition").

Other factors must also be considered in this pragmatic balancing process, including the importance of the discovery, the volume of information and the cost of production. Thus, "in ruling upon objections to discovery requests, trial judges must consider not only questions of privilege, work product, relevance and tendency to lead to the discovery of admissible evidence, but they should also balance the need of the interrogator to obtain the information against the respondent's burden in furnishing it." *State ex rel. Anheuser,* 692 S.W.2d at 328. "It is the affirmative duty and obligation of trial judges to prevent [the] subversion" of pretrial discovery into a "war of paper." *Id.* The "efficiency of the justice system" should not be sacrificed to "mindless overzealous" discovery. *State ex rel. Madlock*, 8 S.W.3d at 891. Indeed, the very premise of this Court's civil rules is "the just, speedy and inexpensive determination of every action." Mo. Sup. Ct. R. 41.03.

B. Discovery Not Relevant to Pleaded Issues

Missouri rules require fact pleading to define the issues and the corresponding scope of discovery. *See ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,* 854 S.W.2d 371, 379-80 (Mo. banc 1993). As this

Court has repeatedly explained, "discovery is limited to information that relates to matters put at issue in the pleadings." *State ex rel. Madlock*, 8 S.W.3d at 891.

Marcum filed a "Counterclaim for Malicious Prosecution" alleging that GMAC, "maliciously intending to injure [Marcum], instituted this lawsuit against [Marcum]." Appendix 10. Thus, according to the repeated allegations of Marcum's counterclaim, his claim for malicious prosecution is about "this lawsuit." *Id*. And the key fact alleged in support of the allegation of malicious prosecution is that GMAC's "assignor Ray Shepard Motors, Inc., failed to assign the title to the subject vehicle to [Marcum] within the time required by law and therefore the sale was fraudulent and void." *Id.* at 9.

Rather than seeking information specifically related to any suits by GMAC against customers of Ray Shepard Motors, Inc. who did not receive title, Marcum seeks information showing late receipt of title by any Missouri or Kansas customer—regardless of whether GMAC ever filed suit and regardless of the selling dealership. This overly broad discovery, which is not limited in time, scope or nature or to the events arising out of Marcum's pleading and the underlying installment contract, is irrelevant for at least two fundamental reasons.

First, at the risk of restating the obvious, this is a malicious *prosecution* action. Discovery regarding persons who were never sued by GMAC is irrelevant to a claim where the essence of the alleged wrongful act is the commencement of suit. "The requested discovery goes beyond a mere fishing expedition, it seems designed to 'drain the pond and collect the fish from the bottom.'" *State ex rel.*

Upjohn Co. v. Dalton, 829 S.W.2d 83, 85 (Mo. App. 1992) (quoting *In re IBM Peripheral EDP Devices Anti Trust Litigation*, 77 F.R.D. 39, 42 (N.D.Cal. 1997)).

Second, discovery regarding a failure to deliver title by potentially hundreds of selling dealerships in Missouri and Kansas is likewise too attenuated to be relevant to any issue regarding GMAC's intent or conduct. It is the dealer who is responsible to deliver title, and a dealer's failure to discharge that responsibility directly and adversely impacts GMAC. Thus, there can be no conceivable argument that GMAC seeks to promote dealer conduct plainly adverse to GMAC's financial interests. Nor does Marcum's petition allege that Ray Shepard Motors, Inc. has any relationship to any other dealership, such as through cross-ownership or other shared operations, so as to arguably support this overreaching discovery. Thus, discovery regarding "any and all buyers" from dealers in a two-state area is overbroad and irrelevant. *See State ex rel. Upjohn*, 829 S.W.2d at 84-85.

Lacking any basis for this discovery in his pleading, Marcum tries to compare this situation to the facts of *Brockman v. Regency Financial Corp.*, 124 S.W.3d 43 (Mo. App. 2004), which is clearly distinguishable. *Brockman* involved actions by a local financing company and automobile dealership operating at one shared location with shared employees and owned by business partners (*id.* at 45) such that, in effect, the same entity delivered title and filed suit. Marcum, by contrast, seeks information solely from a national financing company that does not deliver title, and encompassing *any* of hundreds of unrelated dealerships selling a

variety of new and used vehicles in a two-state region. The close relationship between the companies in *Brockman* had a strong impact on the court's holding. *See id*. at 51 (evidence of other lawsuits undercut defendant's claim to lack knowledge of nondelivery of title). Further, *Brockman* involved evidence of actual deficiency lawsuits despite nondelivery of title (*id*. at 50), whereas Marcum seeks to discover a far broader type of information—any document showing GMAC's "knowledge" of delivery of title beyond thirty days of purchase. Appendix 24. Accordingly, the Missouri and Kansas title discovery is not relevant to this lawsuit.

C. Overbroad Discovery Imposes Undue Burden and Cost

Marcum's expansive discovery requests are essentially identical to the ones found unduly burdensome in *State ex rel. Kawasaki Motors Corp.*, 777 S.W.2d 247 (Mo. App. 1989). There, plaintiff submitted a number of discovery requests, including one for "any and all consumer complaints . . . relating to instability or hazard" and another for "all documents relating to users or profiles of users." *Id*. at 249. On plaintiff's motion to compel, the trial court ordered defendant to comply with this request, and defendant filed a petition for writ of prohibition. *Id*. at 250.

In enforcing a permanent writ, the court first noted that the rules of civil procedure "are not talismans without limitations." *Id*. at 251. The court found the discovery requests to be "overbroad and vague" because they were not focused on particular kinds of users or complaints. *Id*. at 252. The court further found that

"the requests are not limited to same or similar circumstances . . . or complaints regarding similar mishaps." *Id*. With respect to the consumer complaint issue, the court limited the discovery of "other prior injuries or complaints" to the "same or similar model" of ATV. *Id*. at 253. This holding is consistent with that of *State ex rel. Ford Motor Co. v. Nixon*, 160 S.W.3d at 381, where the burdensomeness and breadth of the discovery requests caused this Court to issue a writ of prohibition limiting "discovery to the reasonable parameters of the petition."

Likewise, the trial court abused its discretion in requiring GMAC to respond to the Missouri and Kansas title discovery. Even with a time limitation of ten years, the trial court still required GMAC to produce *any* complaints or documents showing knowledge of nondelivery of title—regardless of whether it involved Marcum's dealership. Further, the trial court made no effort to limit the request to situations involving actual deficiency lawsuits, thereby requiring GMAC to produce information and documents on customers against whom no collection action has ever been initiated—and who could not possibly have been victims of malicious prosecution. All of this would be done, at a cost of almost $1,000,000 to review computer records for approximately 540,000 customers, to support a single claim for malicious prosecution arising out of a collection action that sought only about $5,000. This is an astonishingly burdensome order for information that has no relevance to the subject matter of Marcum's claim. By any measure, Respondent's order represents an abuse of discretion.

D. Unexplained Decision Indicates Abuse of Discretion

The record before the Respondent, and now before this Court, establishes that Marcum seeks to discover an exceptional quantity of marginal information far in excess of what might ordinarily be expected in a case such as this. By permitting extraordinary discovery in an ordinary case without articulating any reasons therefor, Respondent abused his discretion. *State ex rel. Metropolitan Transportation Services, Inc. v. Meyers*, 800 S.W.2d 474, 476 (Mo. App. 1990) ("Absent a stated legal reason, the trial court's decision appears arbitrary and capricious, indicates a lack of careful consideration, and is unreasonable."); *State ex rel. Soete v. Weinstock*, 916 S.W.2d 861, 863 (Mo. App. 1996) (trial court's failure to state reasons for its discovery ruling permitting exceptional discovery was a clear abuse of discretion). Indeed, this Court defines abuse of discretion in terms that strongly suggest that an inexplicable discovery ruling outside the norm should not stand: "The trial court abuses discretion if its order is clearly against the logic of the circumstances, its arbitrary and unreasonable, and indicates a lack of careful consideration." *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d at 607. Thus, given the utter lack of any explanation or rationale by Respondent for ordering discovery that will cost nearly $1,000,000 in a case arising out of an action to collect a deficiency on one automobile, the abuse of discretion becomes self-evident.

Accordingly, this Court should enter a writ that prohibits the trial court from ordering any discovery (1) regarding GMAC's knowledge of title delivery to

purchasers against whom GMAC has not filed a collection action, and (2) involving delivery of title by any dealership other than the one where Marcum purchased the vehicle at issue (Ray Shepard Motors, Inc.).

II. In The Alternative To Point I, Relator Is Entitled To An Order Prohibiting Respondent From Denying Relator's Motion That Relator's Discovery Response Costs Be Shifted To Marcum Because Respondent Abused His Discretion By Denying Any Cost Shifting, Without Any Explanation, In That The Requested Information Has Little Or No Value And Is Available Only At A High Cost Entirely Disproportionate To This Case.

Even assuming this extensive discovery has some conceivable value or purpose in the case, its marginal value is so limited that the trial court abused its discretion by ordering GMAC to bear the entire million-dollar cost of producing this information and failing to shift at least some of those costs to Marcum.

Rule 56.01(c)(A-4) allows for cost-shifting. *Stortz by Stortz v. Seier*, 835 S.W.2d 540, 541 (Mo. App. 1992) (Rule 56.01(c) is modeled after Fed. R. Civ. P. 26(c), so federal precedent is authoritative on interpreting same); *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002) (seminal case discussing cost-shifting; citing Fed. R. Civ. P. 26(c) as authorizing cost-shifting).

Rowe adopts a balancing approach that takes into consideration the following factors: (1) specificity of the requests, (2) likelihood of discovering

critical information, (3) availability from other sources, (4) purposes of retaining the information, (5) relative benefit of production to the parties, (6) total cost associated with production, (7) relative ability of each party to control costs and incentive to do so, and (8) resources available to each party. *Id*. at 429. The court in *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 321 (S.D.N.Y. 2003), applied these same factors and added two more: (1) the amount in controversy, and (2) the importance of the issues at stake in the litigation. These ten factors are not to be weighted equally or treated as a checklist; rather, they should provide guidance, with some factors given more importance than others. *Id*. at 322-23.

As described in Point I above, Marcum seeks information with no appreciable relevance to his counterclaim, so factors (2) and (5) from *Rowe*, as well as factor (2) from *Zubulake*, militate in favor of shifting costs to Marcum. Here, there are extremely high discovery costs (approaching $1,000,000), and only a small fraction of that cost is at issue in the lawsuit, so *Rowe* factor (6) and *Zubulake* factor (1) point toward cost-shifting.

With regard to other sources and the ability to control costs (*Rowe* factors (3) and (7)), the trial court could have limited discovery to other collection suits involving Ray Shepard Motors, so Marcum should have to pay to produce the extraneous information he seeks. *See Rowe*, 205 F.R.D. at 433 (requiring plaintiff to "bear the costs of production" other than the cost of reviewing for privilege).

As with the issues of relevance and undue burden discussed in Point I, there is nothing in the trial court record to suggest that Respondent gave any

consideration to cost-shifting as a mechanism to "level the playing field" or establish incentives against "scorched earth" tactics. Likewise, just as there is no indication Respondent considered and balanced any of the factors bearing on the propriety of this discovery, Respondent failed to consider any of the factors bearing on the propriety of cost-shifting. These glaring omissions in the record indicate a lack of careful consideration and therefore an abuse of discretion.

In summary, even assuming the decision to order discovery costing nearly $1,000,000 in an Associate Circuit case could survive review for abuse of discretion, Respondent's decision permitting Marcum to inflict those costs on GMAC without shouldering any of that financial burden was itself an abuse of discretion which this Court should remedy by issuance of an appropriate writ.

III. In The Alternative To Points I and II, Relator Is Entitled To An Order Prohibiting Respondent From Continuing To Exercise Jurisdiction Over The Underlying Case And Directing Respondent To Dismiss It Without Prejudice Due To Lack Of Jurisdiction Because Marcum Filed His Counterclaim For Malicious Prosecution Before It Had Accrued In That The Alleged Malicious Action Filed By GMAC Was Still Pending When Marcum Asserted His Claim.

Marcum filed his counterclaim for malicious prosecution before GMAC dismissed the collection action against him, so Marcum sued before any claim for malicious prosecution could have accrued. Under well-settled Missouri precedent, a trial court has no subject matter jurisdiction over an unaccrued claim, and a writ

of prohibition is properly issued to prevent a trial court from acting without subject matter jurisdiction. *See State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994).

The court of appeals identified this jurisdictional defect (Appendix 105-06), and the parties submitted briefing (Appendix 107-28). Nevertheless, the court of appeals ultimately determined "that the issue of jurisdiction is not clear cut" and declined to resolve the issue. Appendix 130. GMAC submits that the court of appeals got it right the first time, so that even apart from the trial court's abuse of discretion in discovery, a writ should issue directing Respondent to dismiss the action without prejudice so as to prevent Respondent from continuing to act without subject matter jurisdiction.

A. Subject Matter Jurisdiction Only for Accrued Claims

Whether a party states a claim for relief depends upon "the facts as they exist at the *time of the filing* of [the counterclaim], . . . and not as they exist at the time of trial." *Farmers Insurance Co. v. Miller*, 926 S.W.2d 104, 107 (Mo. App. 1996) (emphasis added). Accordingly, a party cannot sue "prematurely before a cause of action has accrued and any action so brought may not be maintained even though the cause of action has accrued at the time of trial." *Id*. (citing *Lindsay v. Evans*, 174 S.W.2d 390, 395 (Mo. App. 1943)) (at the time of filing, plaintiffs' claim had not accrued because plaintiffs had not yet obtained judgment against the tortfeasor—a necessary element of a garnishment claim against the insurance company); *see also J.C. Jones & Co. v. Doughty*, 760 S.W.2d 150, 159 (Mo. App.

1988) (noting that a pleading that "states no cause of action confers no subject matter jurisdiction a court can adjudicate, and is subject to dismissal").

The facts of *Niedringhaus v. Zucker*, 208 S.W.2d 211 (Mo. 1948), illustrate how Missouri courts handle nonaccrued claims in the context of a malicious-prosecution claim. There, the plaintiff filed an ejectment action and, while that action was still pending, defendant counterclaimed for malicious prosecution. *Id*. Plaintiff responded by dismissing his ejectment action and moving to dismiss defendant's counterclaim. *Id*. The trial court dismissed on account of defendant's failure to allege, in his counterclaim, a termination of the ejectment action. *Id*. This Court affirmed the dismissal of the malicious-prosecution counterclaim: "The termination of the alleged malicious action in favor of the plaintiff who sues for damages must be alleged in order to state a cause of action." *Id*.

These facts are almost procedurally identical to those in the case at bar. On April 28, 2004, GMAC filed the collection action to recover $5,240.25 owed by Marcum on an installment-sale contract. Appendix 1. On June 18, 2004—while the collection action was still pending—Marcum filed his counterclaim for malicious prosecution. Appendix 10. In that pleading, Marcum admitted that GMAC's claim had not yet been dismissed and "continues to be prosecuted." *Id*. at 10, ¶¶ 22-23. One month later (July 15, 2004), GMAC dismissed the collection action. Appendix 43. Regardless of GMAC's later dismissal, the legal defect in Marcum's counterclaim when filed subjects that counterclaim to dismissal. *Niedringhaus*, 208 S.W.2d at 211-12; *see also Euge v. LeMay Bank & Trust Co.*,

386 S.W.2d 398, 399 (Mo. 1965) (affirming trial court's dismissal without prejudice because, "[i]nstead of alleging termination of the alleged malicious action, appellant has done the opposite and stated that such action is still pending, in which case he states no cause of action").

B. Marcum's Arguments Are Unavailing

Before the court of appeals, Marcum advanced essentially three arguments in an effort to justify Respondent's continued exercise of subject matter jurisdiction. First, Marcum attempts to portray the case authorities cited by GMAC (and the court of appeals) as somehow obsolete. Second, Marcum relies on malicious prosecution cases that never even discuss jurisdiction. Finally, Marcum argues the jurisdictional defect can be cured with a motion to amend.

1. GMAC's Cases are Authoritative

Marcum asserts that *Niedringhaus*, *Euge*, and *Lindsay* are non-authoritative and outdated. However, their key holding—that non-accrued claims are subject to dismissal, regardless of the occurrence of later events—has been reaffirmed as recently as 1996 in the *Farmers* decision from the Missouri Court of Appeals for the Eastern District. Notably, Marcum omitted any discussion of this case before the court of appeals. Appendix 112-17. Other distinctions are absolutely meritless. For example, Marcum attempted to distinguish *Euge* on the grounds that the claimant there affirmatively alleged that "the matter was still pending" (Appendix 113), but Marcum's own pleading explicitly states that GMAC's lawsuit "continues to be prosecuted." Appendix 10, ¶ 23.

Marcum also contends that *Lindsay* is outdated because it was decided prior to the enactment of the present rules of civil procedure. Although this Court adopted the present rules in 1960,[3] the statutes that preceded the rules contained most of the language in the rules that Marcum emphasized in his response to the court of appeals. Appendix 115-16; *compare, e.g.*, Mo. Rev. Stat. § 509.470 (1943) and Mo. Sup. Ct. R. 55.06(b) (both contain Marcum's italicized language); Mo. Rev. Stat. § 509.440 (1949) and Mo. Sup. Ct. R. 55.32(d) (same).

In any event, *Farmers* (1996) and *Euge* (1965) contain the key language that is fatal to Marcum's counterclaim, and each of these cases was decided after the present rules were adopted in 1960. Further, the key holdings of the older cases—*Niedringhaus* and *Lindsay*—are not even contingent upon these rules; rather, they rest on fundamental legal principles related to claim accrual and subject matter jurisdiction. Finally, none of the cited rules contradicts the notion—set forth in *Farmers*—that nonaccrued claims cannot be saved by later events.

2. *Brockman* and *Burnett* are Inapposite

Marcum cited *Brockman v. Regency Financial Corp.*, 124 S.W.3d 43 (Mo. App. 2004), and *Burnett v. GMAC Mortgage Corp.*, 847 S.W.2d 82 (Mo. App. 1992), to the court of appeals as purported authority for his right to assert a

[3] Committee Notes to Mo. Sup. Ct. R. 41.01 (noting effective date of April 1, 1960).

nonaccrued claim. But, as Marcum concedes (Appendix 114), neither case discusses any jurisdictional issues, let alone anything related to the consequences of pleading a claim that has not yet accrued. In addition, the failure of a party or court to raise a profound jurisdictional issue—as occurred in these two cases—does not provide authority for the nonexistence of such an issue, as Marcum contends. Accordingly, these cases are simply not pertinent to this jurisdictional issue.

3. Marcum's Motion for Leave to Amend is Immaterial

As part of his response to the court of appeals' show-cause order, Marcum scrambled to submit a motion for leave to file a proposed amended counterclaim, which Respondent has never granted. Appendix 119-28. Marcum's motion to amend does not save his prematurely-filed claim, because a nonaccrued claim "may not be maintained even though the cause of action has accrued at the time of trial." *Farmers Insurance Co.*, 926 S.W.2d at 107 (citing *Lindsay*, 174 S.W.2d at 395). *See also Herbig v. Herbig*, 245 S.W.2d 455, 457 (Mo. App. 1952) (a claimant cannot, through an amended pleading, "set up a cause of action which had not accrued at the time the original petition was filed").

CONCLUSION

This Court should issue a Writ of Prohibition that prohibits Respondent from ordering any discovery (1) regarding GMAC's knowledge of title delivery to purchasers against whom GMAC has not filed a collection action, and (2) involving delivery of title by any dealership other than the one where Marcum purchased the vehicle at issue (Ray Shepard Motors, Inc.). Alternatively, the Court should issue a Writ of Prohibition that shifts discovery costs to Marcum.

Independently, because GMAC's collection action was then pending, Marcum's counterclaim for malicious prosecution had not accrued when it was filed. Accordingly, this Court should enter a writ directing Respondent to dismiss, without prejudice, Marcum's counterclaim for malicious prosecution.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. The brief includes the information required by Rule 55.03;

2. The brief complies with the limitations contained in Rule 84.06(b);

3. According to the word count function of counsel's word processing software (Microsoft® Word 2002), the brief contains 6,776 words; and

4. The floppy disk submitted herewith containing a copy of this brief has been scanned for viruses and is virus-free.

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R. Kent Sellers

CERTIFICATE OF SERVICE

On this 19th day of September, 2005, I hereby certify that two copies of the above and foregoing together with a copy of this brief on disk were served by hand delivery, addressed to:

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